

**VIA FACSIMILE**

July 19, 1999

Myron O. Knudson, P.E.
 Director, Superfund Division (6SF)
 United States Environmental Protection Agency, Region VI
 1445 Ross Avenue, Suite 1200
 Dallas, Texas 75202-2733

Re: *Westbank Asbestos Site, Marrero, Jefferson Parish, Louisiana*

Dear Mr. Knudson:

The purpose of this letter is to provide comments and objections of Johns Manville International, Inc. ("JM") concerning the United States Environmental Protection Agency ("EPA" or the "Region")'s activities with respect to the Westbank Asbestos Site in Jefferson Parish, Louisiana. So serious and numerous are the problems with the Region's response action that agency response costs are not fully recoverable. By way of background, JM has participated in a number of meetings with EPA and the Department of Justice ("DOJ"), as well as in a number of telephone conferences, concerning the Westbank Asbestos Site. JM has also provided significant information and data on remedial alternatives.

EPA's response action at these approximately 1,400 individual sites was prompted by asbestos-containing cement materials ("ACM") that had been used in paving driveways and public servitudes in the Westbank area. These are the Phase I sites. The materials were allegedly a by-product of JM's cement pipe manufacturing plant in Marrero, but may also have come from other asbestos products manufacturers in the area. EPA determined that these materials had become weathered. After nearly three years and over \$16,000,000, this "time critical removal action" is still not yet complete. The Region has informed JM that, in terms of square footage, this \$16,000,000 has addressed only one-half of the total affected area. Together the Phase II nonresidential sites are approximately equal in area to all 1,400 Phase I sites. JM understands that the Region has made no decision on the Phase II sites, has no schedule for making a decision, and is not monitoring the physical condition of the Phase II sites. Further, the Region has taken no steps to notify the owners and operators of the Phase II sites to advise them on how to reduce any potential risks from these sites.

As will be described in more detail below, EPA's removal action was inconsistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),

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6SF-R
 Call ~~Chad~~ Ryan/etc
 Let's discuss Phase II -
 7/20/99
 6SF-A
 Call Bill H/Buddy P
 Re: cost recovery
 Does 6 ORC have
 a copy of this?
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and the National Contingency Plan ("NCP"), and EPA's response costs are therefore not fully recoverable. Moreover, EPA has failed to consider and follow its own CERCLA policies in several critical respects, and these failures may make recovery from other potentially responsible parties significantly more difficult if not legally impossible. Should EPA attempt to proceed with Phase II of its response activities in the same manner as was followed in Phase I, its response costs for these activities will also not be recoverable. JM therefore requests that a proper remedial investigation/feasibility study be conducted before proceeding with Phase II and JM is prepared to participate in this process. Among other things, EPA failed in Phase I to consider remedial alternatives that would have been far more cost effective than the methods actually employed and that could have abated the potential risks much more rapidly. EPA has still not conducted a detailed evaluation of alternatives and appears to be hoping that the Phase II sites will deteriorate to such a degree that it can finally conduct a time-critical removal action. It is only through the mechanism of an RI/FS that alternatives can be fully considered.

JM contends that EPA acted arbitrarily and capriciously by: failing to notify JM and other potentially responsible parties before proceeding with its removal action; failing to conduct an analysis of alternatives; and vastly exceeding the monetary and duration limits on removal actions without proper justification. EPA has also failed to comply with its own policies concerning notice to insurers of the residential property owners. JM has been advised by the Region that EPA does not intend to pursue homeowners for any recovery, even though many of them do not fall within the provisions of EPA's policy regarding owners under which EPA exercises its enforcement discretion. Notwithstanding the foregoing, JM is still willing to attempt to reach a settlement that would potentially involve its limited participation in future phases of the response action. JM would like to meet again with EPA to discuss such a settlement.

I. LEGAL REQUIREMENTS APPLICABLE TO EPA'S RESPONSE ACTION

A. Statutory Factors

CERCLA clearly contemplates that EPA's removal authority be limited in terms of time and dollar amounts, and that response activities that will be more costly and that will require a long period of time to implement be managed as remedial actions after an appropriate evaluation of the cost effectiveness of remedial alternatives has been completed. The statute contains limitations on the total dollar amount and duration of removal actions in Section 104(c), 42 USC § 9604:

"Unless (A) the President finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not be provided on a timely basis, or (B) the President has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection and the State or States in which the source of the release is located have complied with the requirements of paragraph (3) of this subsection, or (C) continued response action is otherwise appropriate and consistent with the remedial action to be taken obligations from the

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Fund, other than those authorized by subsection (b) of this section, shall not continue after \$2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances." 42 USC § 9604(c).

B. The National Contingency Plan

The National Contingency Plan (NCP) contains a number of provisions of interest in this case. First of all, the NCP contains the statute's preference that potentially responsible parties be afforded the opportunity to conduct removal actions before EPA obligates Superfund money on such projects:

"(2) When the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly." 40 CFR § 300.415(a)(2).

In addition, while a removal action is subject to a lesser degree of evaluation than a remedial action, the NCP clearly contemplates that EPA consider alternatives. Whenever time permits, EPA must conduct an Engineering Evaluation/Cost Analysis or its equivalent:

"Whenever a planning period of at least six months exists before on-site activities must be initiated, and the lead agency determines, based on a site evaluation, that a removal action is appropriate:

(i) The lead agency shall conduct an engineering evaluation/cost analysis (EECA) or its equivalent. The EE/CA is an analysis of removal alternatives for a site."

The NCP has a provision that implements the statutory limits on amount and duration of removal actions discussed above:

"(5) CERCLA fund-financed removal actions, other than those authorized under section 104(b) of CERCLA, shall be terminated after \$2 million has been obligated for the action or 12 months have elapsed from the date that removal activities began on-site, unless the lead agency determines that:

(i) There is an immediate risk to public health or welfare of the United States or the environment; continued response actions are immediately required to prevent, limit, or mitigate an emergency; and such assistance will not otherwise be provided on a timely basis; or

(ii) Continued response action is otherwise appropriate and consistent with the remedial action to be taken." 40 CFR § 300.415(b)(5).

In the preamble to the NCP EPA distinguishes removal actions from remedial actions:

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"Removal authority is mainly used to respond to emergency and time-critical situations where no *long* deliberations prior to response is feasible." 55 Fed. Reg. 8666 (March 8, 1990). Emphasis supplied.

As discussed below, Region V's management of this site is inconsistent with the regulatory distinction.

C. JM's Global CERCLA-Bankruptcy Order

On July 7, 1991, JM initiated a declaratory judgment action in United States Bankruptcy Court for the Southern District of New York. The purpose of the action was to seek an order from the Court declaring that the Company's CERCLA liability at four named sites was discharged as a result of the bankruptcy reorganization. A settlement of that action was finalized in the **Stipulation and Order of Dismissal and Settlement** which was entered as an order of the Court on October 28, 1994 in *Manville Corp. et al. v. United States of America*, United States District Court for the Southern District of New York (91 Civ. 6683 [RWS]) (Global Order). The settlement applies to all JM-related companies that were listed as debtors in the Chapter 11 proceedings, including Johns Manville International, Inc., the company that operated the Marrero asbestos cement pipe plant. The Global Order established a procedure to determine JM's fair share at any such site and then limits JM's liability to 55% of its fair share up to an annual maximum of \$850,000.

The Global Order serves to implement JM's bankruptcy defense at additional sites so that the defense does not have to be litigated in each instance where EPA alleges JM CERCLA liability. Accordingly, under the provisions of Paragraph 68 of the Global Order, JM reserves all other rights and defenses including the rights

... it may have to participate in and review all aspects of the identification of and activities relating to an Additional Site, and the right to review, audit or object to the amount and type of Response Costs or Natural Resources Damages ...

Thus, just because JM has in place a court Order to deal with the bankruptcy defense, does not mean that EPA can ignore its duty to notify JM as early as possible of the existence of an Additional Site so JM can adequately participate. In addition, JM can, and where appropriate will, argue that it has no CERCLA liability at all (and hence that the MONBAR is not relevant) or that certain response costs are inconsistent with the NCP and hence not recoverable.

Also under the terms of Paragraph 68 EPA cannot make JM perform any work; instead, EPA is limited to making JM pay 55% of its fair share. However, JM can choose to voluntarily to perform work at an additional site in lieu of simply paying money. JM has chosen to do just this at the Waukegan, Illinois Additional Sites where it has spent well over \$100,000 in characterizing the contamination and evaluating remedial alternatives.

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II. EPA DID NOT MEET APPLICABLE LEGAL REQUIREMENTS

A. EPA Failed to Comply With the NCP

A comparison of EPA's Action Memorandum with the NCP shows that EPA's removal action was inconsistent with the NCP in at least three respects: (1) EPA failed to determine whether responsible parties could or would perform all or part of the removal action promptly and properly; (2) EPA failed to perform an engineering evaluation/cost analysis or equivalent; and (3) EPA exceeded the statutory restrictions on cost and duration of removal actions without adequate justification. EPA largely ignored the first two requirements, and made a very feeble attempt to provide a justification to exceed the statutory limits on expenditures and duration of removal actions. The factual basis for JM's comments is set forth below.

1. EPA failed to comply with 40 CFR § 300.415(a)(2)

EPA's Action Memorandum dated September 11, 1996 contains the statement that: "an enforcement-lead response action at the site does not appear possible. Extensive efforts have been made to identify PRPs involved at the Site." This statement is simply not true. There is no evidence that the Region has even attempted to determine whether other responsible parties, public or private, could or would perform the response action. Moreover, even though the Region recognized that JM had operated a plant in the area that manufactured products containing asbestos, its attempts to contact JM could hardly be described as "an effort...to the extent practicable" or as "extensive efforts." The Region began, but for some reason did not complete, its effort to contact JM prior to the initiation of the removal action. Representatives of the Louisiana Department of Environmental Quality (LDEQ) and the Region actually visited the plant (still owned by JM) in 1995 and obtained from the tenant the name and telephone number of the former plant manager and the then current local JM caretaker. The tenant also apparently provided the Region's representative with a telephone number for JM's corporate headquarters in Denver. Inexplicably, the Region then did not even attempt to telephone JM to advise of the planned removal action until after it was well underway. Nor did EPA attempt to contact JM's corporate headquarters in Denver, even though a simple corporate search would have revealed the company's continued existence as a New York Stock Exchange publicly traded company. Moreover, the United States was clearly aware of JM's continued existence, because the United States and JM negotiated the Global Order to resolve JM CERCLA liability (including liability for a Region VI site), which was approved by the Court in October 1994, and again in April 1995.

EPA has also refused to determine if other parties might be the source of or have liability for some of the asbestos containing materials used in these areas. There was at least one other manufacturer of asbestos products in the area but EPA has yet to submit an information request to that company. There is at least one public entity that obtained the material for use in paving public areas. There were reports from EPA that after the materials were somehow obtained from JM that fillers such as dolomite were added by as yet unknown parties, apparently to improve

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physical characteristics. Finally, there were reports that men with a truck sold the materials door to door in the Westbank area. Notwithstanding the foregoing, the Region has refused to investigate these potential liable parties. This refusal is curious given the fact that, under the Global Order, even if the Manville Share is determined to be 100%, the Region will have a 45% orphan share in excess of \$7,000,000 at the Phase I sites alone. We understand that the Region is still considering the issuance of a CERCLA section 104(e) request to the other asbestos products manufacturer but is not prepared to do so for some time or until JM submits appropriate questions to be used in the request.

Nor has EPA sought action or compensation from the property owners of the affected properties or their insurers. EPA's "**Policy Towards Owners of Residential Property at Superfund Sites**" (OSWER Directive # 9834.6) provides that the Agency, in the exercise of its enforcement discretion, will not take enforcement action against homeowners to attempt to obtain response costs unless the homeowners' activities led to a release or threat of release of hazardous substances. The policy does not apply when the homeowner fails to cooperate with EPA. JM has been advised that some homeowners have not readily afforded EPA access to their property. In addition, homeowners have varying degrees of culpability with respect to this material. Many of them knew full well that they were obtaining asbestos containing material, and some may themselves have been involved in obtaining the material from the plant or from middlemen. According to EPA's own documentation, the threat of fiber release was caused by people driving over driveways containing asbestos containing material. This is not a situation where hazardous waste was dumped at night on residential properties; rather, this material was applied to the properties at the request of and for the benefit of the homeowners.

Even more inexplicably, EPA apparently has not placed any of the homeowners' insurers on notice concerning its response costs. EPA has developed Guidance, which it is apparently implementing in Region VI to the analogous situation of homes that were contaminated with methyl parathion. See "**Interim Guidance on Maximizing Insurers' Contributions to Responses at Residences Contaminated with Methyl Parathion**," dated August 1, 1997. In this Guidance, EPA sets forth a three step process that must be completed prior to incurring any response costs. This process involves providing insurers with prompt written and/or oral notice prior to the incurrence of response costs, obtaining assignments to insurance proceeds from homeowners, and negotiations with insurers to expedite contribution. Despite the availability of similar claims in this case, it does not appear that the Region has even considered pursuing homeowners' insurers in the case of the Westbank Asbestos Site; through its inactivity the Region may have waived its right to do so. At a minimum, JM's share should be reduced by the amount that EPA should have collected from homeowners and their insurers had they been promptly notified and claims appropriately prosecuted.

2. EPA failed to comply with 40 CFR §300.415(b)(4)

The Action Memorandum makes it clear that EPA had ample time before initiating the removal action to conduct an engineering evaluation/cost evaluation, and failed to do so.

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According to the Action Memorandum, the Louisiana Department of Environmental Quality (LDEQ) and EPA began evaluating the site in early 1990, and analyzed both bulk samples from "various residential locations" as well as air samples. In January 1992, the EPA remedial site assessment section conducted a Preliminary Assessment, and in October 1994, a Site Inspection was conducted. Subsequent to the October 1994 Site Inspection, EPA determined that the Site did not qualify as a potential candidate for inclusion on the National Priority List, and a decision of No Further Action Planned was recommended, and issued in March 1995. EPA abruptly reversed course after being contacted by LDEQ in November 1995. In January and February 1996, EPA conducted a visual inspection, and in March 1996, collected bulk and soil samples (apparently, no additional air samples were collected). The Action Memorandum was apparently prepared in August 1996, and approved in September 1996. The actual removal action apparently began shortly after approval.

In fact, we understand that a principal reason why the Region did not follow the usual remedial program was administrative. At the EPA-JM meeting in Dallas on February 13, 1997 JM asked Regional officials why this project did not go through the RI/FS remedial action process. Their response, in a moment of candor, was that a removal action was chosen because sufficient remedial action funds were not available while ample removal funds were.

Moreover, EPA's actions were inconsistent with the time-critical appellation it adopted here. Despite the fact that there were over one thousand sites, EPA used only two crews and did not work weekends or holidays. Further, homeowners were not directed to keep their cars off the driveways even though this was the very mechanism EPA alleged was the source of potential fiber release. Either EPA was negligent in allowing a "health emergency" to persist for over two years without taking action at all sites, or the emergency declaration was simply used as cover for short circuiting the EE/CA or RI/FS process thereby causing EPA to incur excessive and unnecessary response costs.

Notwithstanding Region VI's suggestion to the contrary, the Action Memorandum provides no indication that EPA considered any alternatives other than the one selected. The Action Memorandum also does not contain an evaluation of costs, and EPA's costs have soared far above the estimates contained in the Action Memorandum. Although EPA has labeled the removal action as time-critical, neither the record nor EPA's conduct of this response action supports this characterization. At the very least, EPA should have conducted an EE/CA in accordance with the NCP, and its failure to do so precludes the Agency from recovering its response costs.

An EE/CA or RI/FS would have been particularly useful in this case. Had the Region spent any time reviewing alternatives (including those that JM readily found in the trade press and yellow pages), EPA could have abated the potential hazard through encapsulation much sooner and at significantly less cost. JM previously provided this information concerning paving technologies to EPA which demonstrated that EPA could have accomplished the same (or better) result at a significantly lower cost by encapsulating driveways and servitudes rather than

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excavating them. EPA's failure to evaluate these and other alternatives and to develop engineering plans resulted in a removal action which was unduly expensive, and which may require significantly more maintenance than alternatives. Although JM has repeatedly recommended that EPA consider various kinds of encapsulation alternatives, it does not appear that EPA has ever seriously or systematically considered this information. An additional copy of JM's April 1998 remedial alternatives analysis and the January 1999 supplement will be transmitted under separate cover. JM will continue to periodically update this information.

3. EPA failed to comply with 40 CFR § 300.415(b)(5)

As described above, both the statute and the NCP place restrictions on the amount and duration of removal actions. The clear intent is to limit removal actions to emergency situations that need to be addressed immediately. EPA is required to conduct a more thorough analysis prior to embarking on response actions that will take a longer time and more money to implement - especially if the remediation effort, as it was here, is intended to be the permanent remedy. Cost effectiveness can be considered only in the context of such a thorough analysis.

Although the Action Memorandum pays lip service to the statutory factors, it does not provide a justification for avoiding the statutory limits. EPA had previously concluded that the site was not even a sufficient threat to warrant further action, and then abruptly changed its approach. The only empirical data concerning airborne exposure to asbestos (air samples) showed that asbestos was not detectable in the air (12 samples) or detectable at background levels (3 samples), even close to driveways containing asbestos material. The Region commenced a comprehensive air sampling program when the removal action began, apparently concerned that excavating the asbestos containing materials with heavy equipment would lead to fiber release. The Region later cancelled this program after every sample came back with no detectable fiber concentrations.

EPA instead based its action memorandum on visual observations that children were playing on the driveways, and that dust was observable. There is no analysis that shows that the dust observed even contained asbestos. The Action Memorandum contains conclusory statements to the effect that the asbestos containing material had become "extremely friable" since the site assessment in 1990; however, these statements are not consistent with EPA's description of its own process, which involved site visits in 1990, a preliminary assessment in 1992, and a site inspection in October 1994. Nor is there any explanation as to why the asbestos containing material, which, by EPA's own admission, had not been offered to residents since 1965, was suddenly deteriorating so much more rapidly during the period between EPA's March 1995 decision that no further action was necessary and its August 1996 declaration of a "health emergency." JM is unaware of any physical process or event that could have caused such an abrupt transformation.

The Action Memorandum is filled with conclusory statements completely unsupported by specific facts. It is clear that EPA had decided to conduct a removal action, and was merely attempting to construct a record that justified exceeding the statutory monetary and

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time limitations. Although EPA attached a document that purports to be an Agency for Toxic Substances and Disease Registry (ASTDR) Record of Activity in support of its Action Memorandum, it is clear that the neither EPA nor ASTDR made any actual evaluation of the potential *risk* to human health or the environment posed by the Westbank Asbestos site. The ASTDR attachment indicates that ASTDR merely reviewed the action memorandum, summarized the well known hazards of asbestos, and assumed the statements made by EPA were correct. The document does not even purport to address asbestos risks at the site or even indicate that immediate action is necessary. In fact, the ASTDR memorandum contains the following recommendation: "If removal actions are not initiated within the six to eight months, interim measures should be taken to stop or reduce exposure to asbestos contamination." This statement vitiates any contention by EPA that the need for immediate action was sufficiently great that an RI/FS or at least an EE/CA could not be conducted.

Had EPA followed its own, legally mandated procedures, EPA would have taken a very different approach. EPA would have determined whether JM and others were willing or able to conduct all or part of the removal actions. EPA would have properly considered alternatives in addition to the excavation remedy that was actually implemented - especially those alternatives that would have been conducted faster, more efficiently and at a much lower cost. It also would have made at least some effort to notify homeowners' insurers, obtain assignments of claims, and prosecute such claims so as to maximize recovery of insurance proceeds. Instead, EPA bowed to budgetary and political pressures and implemented a response action that was excessively expensive and which so far has taken nearly three years to implement.

III. EPA CANNOT RECOVER RESPONSE COSTS IF ITS ACTIONS ARE ARBITRARY AND CAPRICIOUS

Courts have recently taken an increasingly hard look at whether EPA's expenditure of Superfund monies is sufficiently arbitrary and capricious so as to preclude recovery. In *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.2d 1019 (8th Cir. 1998), the United States Court of Appeals for the Eighth Circuit found that the Minnesota Pollution Control Agency had: conducted a cleanup in an arbitrary and capricious manner because it failed to undertake a feasibility study before selecting the remedy; relied upon an EPA Site Assessment, but ignored an EPA contractor's statement in the Site Assessment that the remedy selected was "questionable"; and provided minimal public notice of the proposed remedy and contracted to conduct it before the public comment period ended. The Eighth Circuit stated:

"It is important to everyone that necessary environmental remediation be timely completed as cost effectively as possible. Therefore, the kind of arbitrary and wasteful agency action that occurred in this case cannot be rewarded. On the other hand, private parties that are responsible for necessary cleanups should not receive a financial windfall from the Superfund because the environmental constable blundered. We believe the CERCLA cost recovery standards set forth in this

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opinion will encourage those involved in future cleanups to achieve the most cost-effective and environmentally appropriate solution." 155 F.2d 1019.

Similarly, in *Washington State Department of Transportation v. Washington Natural Gas Company*, 59 F.2d 793(9th Cir. 1995), the Ninth Circuit determined that the Washington Department of Transportation was not entitled to recover its response costs because it had failed to follow the NCP:

"The interagency team fell particularly short when it failed to reevaluate alternatives after discovery of the additional tar. Analysis of alternatives follows assessment of the nature and extent of the problem. Once it became clear that the initial assessment grossly underestimated the amount of tarry material on the site, the team should have reconsidered the available alternatives. Instead, the team continued to rely on an analysis of alternatives designed to address a much smaller problem...

"Finally, WSDOT failed to provide an opportunity for public review and comment of the alternative remedial measures it was considering. (citation omitted), Although the public comment provision was not part of the 1982 NCP, WSDOT discovered the additional material after publication of the 1985 NCP and should have provided public comment after reevaluating the alternatives available to it.

"Looking at the situation as a whole, we have no difficulty concluding that WSDOT's actions were inconsistent with the NCP. WSDOT failed to assess accurately both the nature and the extent of the threat posed by the presence of PAHs in the soil, failed to evaluate alternatives in the matter prescribed in the NCP and failed to provide an opportunity for public comment. Given the high degree of inconsistency with the requirements set forth in the NCP, WSDOT's action is arbitrary and capricious. Therefore, WSDOT is not entitled to recover its response costs under 42 USC § 9607."

The United States Court of Appeals for the Fifth Circuit has also refused to allow EPA to recover response costs where its actions were arbitrary and capricious. In *Bell Petroleum Services, Inc. v. U.S. Environmental Protection Agency*, 3 F.3d 889 (5th Cir. 1993), the Court denied EPA's attempt to recover the cost of replacing a local water supply. The Court found that EPA's decision to implement an alternate water supply system was arbitrary and capricious, and was therefore inconsistent with the NCP, and the cost of implementing it could not be recovered:

"We realize that, as a result of our decision disallowing the EPA's costs for the AWS, those costs will have to be borne by the Superfund. Although regrettable, this is the inevitable result of arbitrary and capricious EPA decision making. Without knowing, or even attempting to learn, whether the AWS would serve to protect the safety and health of anyone, the EPA officiously ignored the comments of Bell and Sequa, and the results of its own remedial investigation, and stubbornly

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proceeded to spend over \$300,000 to furnish a water supply system that was not needed, was not allowed to be used by commercial establishments whose wells (according to the administrative record) were the only ones with chromium contamination in excess of the SDWA standards, and did very little indeed, if anything--to reduce any perceived public health threat posed by the chromium contaminated groundwater. We can only assume that the EPA was not concerned about the cost of the AWS because it believed that it could recover whatever was spent from Sequa. Although the EPA's powers under CERCLA are indeed broad, Congress has not provided that private parties must pay for the consequences of arbitrary and capricious agency action."

In *United States v. Broderick Investment Company*, 1997 U.S. Dist. LEXIS 2298, and 963 F.Supp. 951 (U.S.D.C. Colo.1997), the United States District Court for the District of Colorado found that EPA's use of a 1×10^{-5} cancer target risk factor had been arbitrary and capricious, and disallowed increased EPA response costs attributable to the more stringent risk factor. The Court also did not allow EPA to collect an additional \$1.3 million in response costs attributable to higher than anticipated solids content due to the Agency's failure to follow proper procedures in implementing the NCP.

EPA's actions with respect to the Westbank Asbestos site are similarly arbitrary and capricious. At the behest of the State, EPA ignored the results of its earlier investigation as well as its own conclusions and monitoring data, and decided to proceed with the remedial action based on an Action Memorandum that was replete with conclusory statements but with no new supporting factual data. EPA further ignored alternatives that would have allowed the work to be done significantly more quickly and cost effectively. There is no indication that EPA has considered these alternatives for the next phase of its response. Region VI's actions were in sharp contrast to those of Region I in conducting the Raymark Superfund site in Stratford, Connecticut. In that case, which involved similar properties and additional contaminants, EPA and the company conducted remedial investigation/feasibility studies and considered alternatives before implementing its response actions.

In addition, JM questions whether many sites were in need of any remediation at all. John Martin, the Westbank site OSC, admitted that he directed EPA crews to replace driveways that were actually in good condition. He speculated that these sites could, perhaps years in the future, deteriorate to the point that some work could be needed. Response costs for all such sites should be considered *per se* inconsistent with the NCP.

JM in May 1998 pursuant to the Freedom of Information Act, requested documents from the EPA concerning the conduct of this removal action by EPA and its contractors. On a number of occasions, JM has also formally requested that these documents not be destroyed, and reiterates that request here. JM has not been, and the Region informs JM that it will not be, afforded access to all the requested documents, particularly to documents in EPA's contractor's

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possession, until the contractor sends documents back to the Region. It is unclear when this transfer of documents will occur. JM reiterates its request to be provided access to all documents relating to EPA's activities at the Westbank Asbestos Site, particularly all decision documents that describe or serve as the basis for EPA decisions in this matter. JM reserves its rights to amend or supplement these comments and objections after it receives the requested documents.

In light of the above, JM believes that litigation would be costly and unproductive, and that there is still room for a settlement. As early as 1997 JM offered to settle for a 67% Manville Share of the costs which would have been incurred had EPA followed an encapsulation remedy rather than the excavation remedy which was employed. EPA has never formally responded to that offer and JM may withdraw the offer at any time - especially after finally reviewing the response action documents. Please be advised that JM is prepared to take an active role in the remedial investigation/feasibility study for the commercial/municipal and other properties that appropriately considers other alternatives. JM will contact your representatives so we can further discuss such a settlement.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce D. Ray". The signature is fluid and cursive, with the first name "Bruce" being more prominent than the last name "Ray".

Bruce D. Ray
Senior Environmental Counsel

cc: Keith Smith, Region VI ORC
Alan Tennenbaum, Department of Justice